BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY TRAYWICK	)	
Claimant	)	
	)	
VS.	)	
	)	
AZTEC STUCCO SYSTEMS, INC.	)	
Respondent	)	Docket Nos. 256,135 &
	)	1,002,582 & 1,004,828
	)	
AND	)	
	)	
AMERICAN FAMILY MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the July 6, 2004 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on December 21, 2004 in Wichita, Kansas.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties concede the medical evidence consistently indicates that any permanent injury claimant sustained as a result of his work-related injuries is attributable to the accident which forms the basis for Docket Number 256,153. The subsequent claims, Docket Numbers 1,002,582 and 1,004,828 involved temporary

aggravations only and claimant seeks no further benefits in either of those claims, other than the opportunity for future medical benefits.

ISSUES

Judge Clark awarded claimant a 25 percent whole body functional impairment. In denying claimant's request for permanent partial disability based upon a work disability, he concluded claimant voluntarily left an accommodated position where he was making a comparable wage. Therefore, claimant was not entitled to anything beyond the functional impairment pursuant to K.S.A. 44-510e(a).

The claimant requests review and contends the ALJ erred in denying him benefits for a 67.25 percent work disability. Claimant contends the job he returned to following his back surgery was not within his restrictions, and that he was justified in leaving respondent's employ so as to avoid further injury. Claimant has since found employment as a cleanup laborer for a construction company, performing jobs that he contends are far less strenuous and within his restrictions. Thus, claimant believes he is entitled to compensation for his 53.05 percent resulting wage loss as well as his 76.25 percent task loss.

Respondent maintains the ALJ correctly determined that claimant is not entitled to a work disability, because claimant voluntarily left an accommodated position earning a comparable wage. Moreover, respondent alleges the greater weight of the medical evidence suggests that claimant's true permanent impairment is 10 percent, as indicated by Dr. Paul Stein. Respondent argues that the higher impairment opinion offered by Dr. Michael Munhall reflect his improper use of the *Guides.*[1] Thus, respondent requests the Board affirm the ALJ's conclusions with respect to claimant's lack of good faith in retaining his accommodated employment, but modify the ALJ's conclusions relating to functional impairment, and instead, award a 10 percent permanent impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ adequately set forth the facts surrounding the claimant's April 20, 2000 accidental injury and the Board adopts those as if more fully set forth herein. Claimant

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

commenced working for respondent in August 1998. He was originally hired to perform a variety of jobs and serve as the "lead" employee. However, Mike Hampton, the owner of the company, discovered claimant was not as knowledgeable as he once thought, and Mr. Hampton was compelled to hire other, more experienced individuals. Although claimant learned to apply stucco and was able to perform the duties associated with that aspect of the business, eventually, Mr. Hampton discovered that claimant was better as a "detail man."[2] After the stucco portion of the job was completed, claimant would apply caulking to windows and clean up the construction area. In spite of the change in job duties, claimant's rate of pay, $30,000 per year, remained the same.

On April 20, 2000, claimant injured his back while lifting a heavy machine which is used to blow insulation into residential attics. Claimant experienced an immediate sharp pain in his lower back which he reported to his boss, Mike Hampton. Claimant was placed on light duty. His back complaints continued for about 6 weeks and he ultimately went to the emergency room. Claimant was treated with medications and discharged, with a referral to see Dr. Robert Eyster. However, before he could do so, he had another acute onset of back pain which compelled him to go to the emergency room again. Dr. Eyster was called and a L4-5 partial discectomy was performed on June 20, 2000. Claimant reported slight improvement but when his pain complaints in his back and right leg became more intolerable, along with difficulties with his bowel and bladder, surgery was again performed on August 25, 2000. This involved a lateral approach at L4-5 and the rest of the disc was removed.

Approximately 10 months after the initial injury, sometime in 2001, claimant was released to return to work with permanent restrictions of no bending or twisting, lifting 25 pounds occasionally and 15 pounds more frequently. Claimant testified that he was assigned to perform cleanup duties, such as picking up trash and breaking down scaffolding. He stopped lifting the heavy buckets of stucco as well as the heavy planks used in the scaffolding. Nonetheless, claimant continued to have complications.

In December 2001, claimant alleged an aggravation to his back resulting from his work activities and then again on May 19, 2002, he suffered another aggravation when his right leg gave out while on a ladder, causing him to fall. He returned to work following both of these aggravations and continued working within the restrictions provided by Dr. Eyster. It appears from the records that Dr. Eyster suggested that a fusion might alleviate some of claimant's ongoing complaints of low back pain and radicular symptoms into his legs.

At his attorney's request, claimant was evaluated by Dr. Paul Stein, a board certified neurosurgeon, on September 13, 2001. The purpose of this evaluation was to elicit Dr.

[2] Hampton Depo. at 32.

Stein's opinion on whether claimant might benefit from a lumbar fusion. During this examination claimant denied any bladder dysfunction, but complained of having bowel movements six to eight times a day.

After a review of the pertinent medical records and his own examination of claimant, Dr. Stein concluded "there is some reasonable chance that a solid lumbar fusion might improve his [claimant's] low back discomfort and make him a little bit more functional."[3] He indicated claimant should continue working within the same restrictions previously imposed as well as avoiding any lifting from below knee level. It is worth noting that Dr. Stein's report indicates claimant had recovered his bowel and bladder function.[4]

Thereafter, the ALJ appointed Dr. Stein to serve as the independent medical physician to provide a diagnostic evaluation and treatment options. At this point claimant was complaining of numbness and tingling in the entire right lower extremity as well as low back spasms. Claimant was also voicing complaints about involuntary jerking of the right upper extremity which he said was getting progressively worse. According to his records, claimant had no clear-cut bowel or bladder dysfunction that was not present before.[5]

Dr. Stein was unable to find a physiologic basis for claimant's arm movement disorder and as a result, suggested an MRI scan of the brain as well as an EEG. He could not rule out a psychosomatic element and suggested a psychological profile and evaluation. He further recommended a contrasting MRI of the lumbar spine. Pending the results of these tests, he allowed claimant to continue working with all of the previous restrictions along with one additional limitation that claimant should not climb or operate dangerous equipment.[6]

Pursuant to Dr. Stein's referral, Dr. Ted Moeller, a psychologist, evaluated claimant as one who was suffering from major depression with probable psychotic features, along with continuous alcohol and marijuana abuse.[7] Following receipt of Dr. Moeller's report, a functional capacities evaluation was ordered to see if the restrictions claimant had were sufficient. At that point, claimant returned to see Dr. Stein in August of 2002 and there

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[3] Stein Depo., Ex. 2 at 6 (p. 4 of 9/13/01 IME Report).

[4] *Id.*, Ex. 2 at 10 (p. 1 of 9/13/01 IME Report).

[5] *Id.*, Ex. 2 at 5 (p. 2 of the 6/27/02 IME Report).

[6] *Id.*, Ex. 2 at 4 (p. 3 of 6/27/02 IME Report).

[7] *Id.*, Ex. 2 at 47 (Moeller's Report at 11).

was, for lack of a better term, a confrontation.[8] Claimant last saw Dr. Stein on September 30, 2002.

Dr. Stein testified that he believed claimant could benefit from some psychiatric treatment. He further testified that he found no physiological basis for the right arm spasms, nor was he able to find any neurogenic cause for the bowel or bladder complaints expressed by the claimant.

Dr. Stein assigned an overall functional impairment rating of 10 percent to the whole body based upon a DRE category III finding.[9] Based upon the FCE results, claimant's physical demand level is in the medium level. He further testified claimant bears an 81 percent (41 tasks lost out of a total of 51) task loss based upon the vocational task analysis prepared by Jon Roselle.

In late 2003, claimant had returned to work with permanent restrictions but apparently began to consider alternative employment options. At this point his job was to mix "mud" which required him to add 2 gallons of water to a large bucket with dry ingredients. He would then use a drill with an attachment to mix the ingredients. Another employee would take the heavy buckets of "mud" to those who apply the stucco. The balance of his workday would involve taping off windows and doors with Visqueen as well as caulking. This would require him to walk up a stairway up to a platform on a scaffold, to the extent that the windows were elevated.

Claimant maintains that in late 2003 he and Mike Hampton came to a mutual agreement that claimant was going to find work elsewhere. Mike Hampton disputes this fact. He agrees that claimant was interested in finding other work, preferably a job that kept him inside rather than outdoors, particularly during the winter months. Otherwise, he believed calimant intended on continuing at his present job.

Claimant asked Mr. Hampton to give him a letter of recommendation. Mr. Hampton agreed, asking claimant to prepare the letter. A letter was prepared in November 2002 and placed on respondent's letterhead. Mr. Hampton signed the letter, which included the following:

> Construction work became too hard for Troy's physical condition. The colder weather just seemed to take its toll on him. It is important for me to tell you, that despite Troy's physical declination, he still managed to give proper notice after

[8] *Id.* at 11.

[9] *Id.* at 14.

> deciding to leave the company. I think that speaks volumes about his character and integrity.
>
> Though I hate to see him go, I must tell you that by hiring Troy Traywick, you will be gaining a valued team member. I'm loosing [sic] a good employee, but as I've told Troy, *he will always have a job here if he decides to come back*.[10]

According to Mr. Hampton, claimant sought out employment as a cook at Wesley Rehabilitation Center in November 2002 and that was what prompted claimant to ask for the letter of recommendation. The letter was signed and given to claimant. However, claimant never began working there and it is unclear if a job was ever offered or if an offer may have been rescinded.

Nonetheless, claimant continued working for respondent until January 15, 2003. At that point, he went to Mr. Hampton and advised him that he needed to leave to tend to his grandmother's house in Seattle, Washington, as she had recently died. Mr. Hampton believed claimant was going to be gone for 2 weeks and would then return. Claimant never returned to work for respondent. Claimant has never been terminated as Mr. Hampton always believed claimant was intending to return to his job.

After approximately 2-3 months, Mr. Hampton discovered claimant was working for Ty Masterson, a construction company, performing cleanup as a laborer. In fact, claimant had apparently been working for that company since late January 2003. According to Mr. Hampton, who has actually observed claimant while he has been working for Ty Masterson, the job claimant presently performs is "probably more strenuous" work than that he was previously performing for respondent.[11] He has to pick up two by fours, bend down and sweep, while cleaning up during the construction process. Claimant's average weekly wage at this job is $280.

At his attorney's request, claimant was evaluated by Dr. Mike Munhall, an orthopaedist, on April 29, 2003. According to Dr. Munhall, claimant bears a 60 percent permanent functional impairment under the 4th Edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, as a result of his April 20, 2000 accidental injury.[12] Dr. Munhall testified that his 60 percent rating is based upon the diagnostic related estimates (DRE) contained within the Guides, and that based upon a "history of progressive or sudden weakness involving one, if not both legs, loss of bowel

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[10] Hampton Depo., Ex. 1

[11] *Id.* at 23.

[12] Munhall Depo. at 6.

and bladder control, leading to a subsequent second surgery"[13], the DRE's assign a category VII, or 60 percent whole person impairment. According to Dr. Munhall, even in those instances when the patient's symptoms resolve, the permanent impairment rating remains the same. Thus, Dr. Munhall's rating includes claimant's subjective complaints of bowel and bladder incontinence.

When cross examined, Dr. Munhall conceded that the *Guides* allow for a category VII impairment only when the bowel or bladder dysfunction requires an assistive device.[14] In this instance there is no evidence within the record that indicates claimant has ever required an assistive device to tend to his bowel or bladder problems. Nevertheless, he stood by his 60 percent impairment assessment.

Dr. Munhall assigned claimant to modified duty, with limited lifting, carrying and pushing capacity to 30 pounds occasionally and 10 pounds frequently. He limited certain functional activities including squatting, crawling, driving and kneeling and he further suggested that claimant was not stable to work off the ground level.[15]

Dr. Munhall was specifically asked whether claimant should perform work that involves standing on scaffolding or climbing ladders. He indicated that he should not. Although his work status report limits claimant from working "off ground" there is no indication that he is to avoid protected heights.[16] When asked to offer a task loss opinion, Dr. Munhall opined that claimant had lost the ability to perform 39 of the 51 tasks itemized by Mr. Roselle.

According to Doug Lindahl, the vocational expert retained by claimant's counsel, claimant is performing at his capacity in his present job and even that is a "stretch".[17] He indicated if claimant would complete his GED he could possibly earn as much as $7.50 to $8.00 per hour. In contrast, Mr. Roselle testified that claimant could expect to earn anywhere from $7-10 per hour as a cashier, a document preparer or in security surveillance.

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[13] *Id.* at 6.

[14] *Id.* at 25.

[15] *Id.* at 8.

[16] *Id.,* Ex. 2.

[17] Lindahl Depo. at 6.

The ALJ painstakingly reviewed the evidence and concluded first, that Dr. Stein, "as concerning the bowel and bladder impairment, is in a better position to determine the causation".[18] Thus, when adjudicating claimant's ultimate impairment, he excluded that portion of Dr. Munhall's impairment rating as it related to the bowel and bladder complaint.[19] To do so, the ALJ must have, at least according to respondent, consulted the *Guides* himself and assigned claimant the next lower impairment rating based upon the DRE VI category, which is 40 percent. The ALJ went on to give "equal weight to the opinions of Dr. Munhall and Dr. Stein" and found that claimant's true impairment was 25 percent, which was nothing more than an average of the 10 percent assigned by Dr. Stein and the discounted category VI rating of 40 percent offered by Dr. Munhall.

Respondent takes issue with the ALJ's decision to use this "creative step" to discount Dr. Munhall's impairment opinion. Respondent argues that it was improper for the ALJ to consult the AMA Guides on his own, as that source was not contained within the record. Respondent believes the appropriate step for the ALJ was to totally disregard Dr. Munhall's opinions as factually unsupported by the record and, when left with just a single medical opinion on the issue of functional impairment, adopt Dr. Stein's 10 percent. The Board has considered respondent's argument and agrees that Dr. Stein's opinion is the more persuasive.

The Board has found it acceptable for an ALJ to, on his or her own, consult the appropriate conversion chart which is contained within the *Guides* when the evidence presented at trial contains an impairment rating to one part of the body but which must necessarily be converted in order to appropriately determine the ultimate functional impairment.[20] This act of converting one impairment to an upper or lower extremity to that of a whole body is merely ministerial. It involves no independent medical judgment and assuming the conversion chart is appropriately read, the result will be consistent regardless of who performs the conversion.

Conversely, the act of consulting the *Guides* and revising Dr. Munhall's impairment rating by disregarding the claimant's bowel and bladder complaints is, in the Board's view, improper. It is reasonable to conclude the ALJ reviewed the *Guides* and made a medical judgment as to whether claimant arguably qualified for a DRE VI impairment. Even if the

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[18] ALJ Award (July 6, 2004) at 6.

[19] When the bowel and bladder complaints are excluded from the claimant's list of symptoms, claimant's functional impairment falls within category VI, which equates to a 40 percent whole body functional impairment.

[20] See *McGrady v. Delphi Automotive Systems,* No. 199,358, 1998 WL 229871 (Kan. WCAB Apr. 6, 1998).

ALJ did not independently consult the *Guides*, his methodology for discounting Dr. Munhall's impairment rating involves a great deal of speculation, in that, he must have assumed that without the bowel and bladder impairment of function, claimant must logically have qualified for a 40 percent rating. In either instance, the Board finds the process employed by the ALJ to be in error. Had the pertinent sections of the *Guides* been contained within the record or had Dr. Munhall's opinions included testimony that claimant's condition, when bowel and bladder complaints were excluded, fulfilled the DRE VI criteria, then the Board's conclusion might well be different.

Based upon this record, the Board finds that Dr. Munhall's opinions are unpersuasive in light of those expressed by Dr. Stein. Dr. Stein saw claimant on numerous occasions. He took all of claimant's complaints at face value and sent him out, as needed, for further evaluations. This included a brain scan, an EEG, MRIs, a consult with a urologist as well as a psychologist and ultimately a FCE. When all of the complaints had been evaluated, it was his opinion that claimant's functional impairment was 10 percent. The Board is persuaded by his opinions, particularly when weighed against those offered by Dr. Munhall, a physician who saw claimant just once, at the request of his attorney. For this reason, the Board finds the ALJ's functional impairment finding should be modified to 10 percent to the whole body for the April 20, 2000 work-related accident.

Claimant takes issue with the ALJ's conclusion that he is not entitled to a work disability under K.S.A. 44-510e(a). When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee**

> **is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute must be read in light of *Foulk*[21] and *Copeland*.[22] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[23]

Here, the ALJ concluded claimant "voluntarily left an accommodated position where he was making a comparable wage and therefore he is not entitled to a permanent partial disability based upon a work disability, and is limited to his 25 percent impairment of function to the body as a whole."[24] The ALJ was obviously not persuaded by claimant's argument that he was unable to perform his accommodated job and had sought out alternative employment as early as November 2002.

After considering the evidence contained within the record, the Board agrees with the ALJ's factual and legal conclusion with regard to claimant's alleged work disability. At oral argument, claimant's counsel repeatedly asserted that claimant's present job was far easier and involved no climbing of ladders as compared to his accommodated job with respondent. Claimant contended that it was unreasonable to have him climbing ladders and that as such, he was justified in leaving his employment with respondent.

The Board is not persuaded by claimant's contentions. It does not appear that claimant made any effort to bring the issue of ladders and his difficulty in climbing them to his employer's attention. While at least one set of restrictions suggest no work above

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[21] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[22] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[23] *Id.* at 320.

[24] ALJ Award (July 6, 2004) at 7.

ground level, Mr. Hampton says that claimant was not working on ladders and that to the extent he had to work on scaffolding, it was on a protected platform and involved only the climbing of a stairway, an act that is not prohibited by the restrictions. Even if claimant thought this violated his restrictions, here it is reasonable to expect him to bring this to his employer's attention and ask for further modification. Respondent had accommodated him and his restrictions and there is nothing within the record to suggest that they would not continue to do so. Indeed, the letter which claimant prepared and was signed by Mr. Hampton says it best:

. . . he will always have a job here if he decides to come back.[25]

Both parties agree claimant left respondent's employ on January 15, 2003 to tend to a family matter and he never returned to his accommodated job. Claimant now has a job that, at least according to Mr. Hampton, is as strenuous if not more so than that provided by respondent, albeit at a lower wage. It requires him to bend down, sweep, and pick up debris. Under these facts the Board finds that claimant has failed to establish a good faith attempt to retain his accommodated employment and therefore, concurs with the ALJ's denial of any award based upon work disability, K.S.A. 44-510e(a).

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated July 6, 2004, is affirmed in part and modified in part as follows:

Docket No. 256,135

The claimant is entitled to 46.29 weeks of temporary total disability compensation at the rate of $383 per week or $17,729.07 followed by 38.37 weeks of permanent partial disability compensation at the rate of $383 per week or $14,695.71 for a 10% functional disability, making a total award of $32,424.78.

As of January 04, 2005 there would be due and owing to the claimant 46.29 weeks of temporary total disability compensation at the rate of $383 per week in the sum of $17,729.07 plus permanent partial disability compensation at the rate of $383 per week in the sum of $14,695.71 for a total due and owing of $32,424.78, which is ordered paid in

[25] Hampton Depo., Ex. 1.

one lump sum less amounts previously paid.

Docket Nos. 1,002,582 and 1,004,828

Claimant is entitled to no award against respondent for permanency in either of these docket numbers.

Claimant is awarded the right to apply for future medical benefits upon proper application.

To the extent claimant has not yet exhausted the unauthorized medical allowance under either of these docket numbers, he is entitled to reimbursement of such unauthorized medical allowance, subject to the statutory cap of $500.

IT IS SO ORDERED.

Dated this _____ day of January 2005

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director